

EDMUND G. BROWN JR.
Attorney General of the State of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GREGORY A. OTT
Deputy Attorney General
ANN P. WATHEN, State Bar No. 189314
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5972
Fax: (415) 703-1234
Email: Ann.Wathen@doj.ca.gov

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONNELL RAY HILL,

Petitioner,

v.

V.M. ALMAGER, Warden,

Respondent.

C 07-3229 JSW (PR)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO
PETITION FOR WRIT OF HABEAS CORPUS**

1	TABLE OF CONTENTS	
2		Page
3	STATEMENT OF THE CASE	1
4	STATEMENT OF FACTS	2
5	ARGUMENT	4
6	I. STANDARD OF REVIEW ON THE MERITS	4
7	II. PETITIONER’S TRIAL COUNSEL RENDERED EFFECTIVE	
8	ASSISTANCE	5
9	A. Standard Of Review	6
10	B. Petitioner’s Trial Counsel Rendered Effective Assistance	6
11	1. Viable Defense	6
12	2. Defense Investigator	8
13	3. Expert Witness	10
14	4. Exclusion Of Jane Doe’s Parents From The Courtroom	11
15	5. Cross-examination Of Jane Doe And Detective Balesteri	12
16	C. There Was No Prejudice	14
17	III. PETITIONER’S CONSECUTIVE SENTENCES DID NOT	
18	VIOLATE HIS RIGHTS UNDER THE FIFTH, SIXTH, AND	
19	FOURTEENTH AMENDMENTS	16
20	A. Relevant Background	16
21	B. The California Courts Did Not Unreasonably Apply United States	
22	Supreme Court Precedent In Denying Petitioner’s Claim	18
23	C. There Was No Prejudice	20
24	CONCLUSION	23
25		
26		
27		
28		

TABLE OF AUTHORITIES

	Page
Cases	
<i>Acha v. United States</i> 910 F.2d 28 (1st Cir. 1990)	11
<i>Apprendi v. New Jersey</i> 530 U.S. 466 120 S. Ct. 2348 147 L. Ed. 2d 435 (2000)	19, 20
<i>Babbitt v. Calderon</i> 151 F.3d 1170 (9th Cir. 1998)	6
<i>Bains v. Cambra</i> 204 F.3d 964 (9th Cir. 2000)	14
<i>Bell v. Lockhart</i> 741 F.2d 1105 (8th Cir. 1984)	12
<i>Blakely v. Washington</i> 542 U.S. 296 (2004)	17, 19, 20
<i>Boag v. Raines</i> 769 F.2d 1341 (9th Cir. 1985)	12
<i>Brecht v. Abrahamson</i> 507 U.S. 619 (1993)	5, 14, 20, 22
<i>Bullock v. Carver</i> 296 F.3d 1036 (10th Cir. 2002)	7
<i>Chapman v. California</i> 386 U.S. 18 (1967)	14, 20
<i>Duncan v. Henry</i> 513 U.S. 364 (1995)	14
<i>Early v. Packer</i> 537 U.S. 3 (2002)	4
<i>Edwards v. LaMarque</i> 475 F.3d 1121 (9th Cir. 2007)	7
<i>Fry v. Pliler</i> ____ U.S. ____ 127 S.Ct. 2321 168 L.Ed. 2d 16 (2007)	5, 14, 20
<i>Hall v. State</i> 823 So.2d 757 (Fla. 2002)	20

TABLE OF AUTHORITIES (continued)

	Page
1	
2 <i>Henry v. Estelle</i>	
3 33 F.3d 1037 (9th Cir. 1993)	14, 20
4 <i>Himes v. Thompson</i>	
5 336 F.3d 848 (9th Cir. 2003)	5
6 <i>James v. Borg</i>	
7 24 F.3d 20 (9th Cir. 1994)	11
8 <i>McMillan v. Penssylvania</i>	
9 477 U.S. 79 (1986)	19
10 <i>Medley v. Runnels</i>	
11 223 F.3d 976 (9th Cir. 2007)	5
12 <i>Moore v. Deputy Commissioners of Sci-Huntington</i>	
13 946 F.2d 236 (3d Cir. 1991)	7
14 <i>People v. Black</i>	
15 35 Cal.4th 1238 (<i>Black I</i>) (2005)	17-19
16 <i>People v. Cunningham</i>	
17 25 Cal.4th 926 (2001)	7, 18-20
18 <i>People v. Holloway</i>	
19 33 Cal.4th 96 (2004)	12
20 <i>People v. Osband</i>	
21 13 Cal.4th 622 (1996)	22
22 <i>People v. Wagener</i>	
23 752 N.E.2d 430 (Ill. 2001)	20
24 <i>People v. Willingham</i>	
25 271 Cal.App.2d 562 (1969)	12
26 <i>Pirtle v. Morgan</i>	
27 313 F.3d 1160 (9th Cir. 2002)	5, 7
28 <i>Robinson v. Ignacio</i>	
360 F.3d 1044 (9th Cir. 2004)	4
<i>Sanders v. Ratelle</i>	
21 F.3d 1446 (9th Cir. 1994)	9, 10
<i>State v. Bramlett</i>	
41 P.3d 796 (Kan. 2002)	20
<i>State v. Cubias</i>	
120 P. 3d 929 (Wash. 2005)	20

TABLE OF AUTHORITIES (continued)

	Page
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

TABLE OF AUTHORITIES (continued)

	Page
1	
2 <i>United States v. White</i>	
3 240 F. 3d 127 (2d Cir. 2001)	20
4 <i>Washington v. Recuenco</i>	
5 548 U.S. 212	
6 126 S. Ct. 2546	
7 165 L.Ed. 2d 466 (2006)	20
8 <i>Williams v. Taylor</i>	
9 529 U.S. 362 (2000)	4, 6
10 <i>Woodford v. Visciotti</i>	
11 537 U.S. 19 (2002)	4
12 <i>Ylst v. Nunnemaker</i>	
13 501 U.S. 797 (1991)	4
14	
15 Constitutional Provisions	
16 United States Constitution	
17 Fifth Amendment	2
18 Sixth Amendment	2, 5, 18
19 Fourteenth Amendment	2
20	
21 Statutes	
22 California Evidence Code	
23 § 777 (a)	12
24 California Penal Code	
25 § 166 (c)(1)	2
26 § 236/237	1
27 § 245 (a)(1)	1
28 § 262 (a)	1
§ 273.5 (a)	1
§ 286 (c)(2)	1
§ 288a (c)(2)	1
§ 289 (a)(1)	1
§ 422	1
United States Code, Title 28	
§ 2254 (d)	4, 5, 16
§ 2254 (d)	4
§ 2254 (e)(1)	4
26 Other Authorities	
27 AEDPA	5
28	

EDMUND G. BROWN JR.
Attorney General of the State of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GREGORY A. OTT
Deputy Attorney General
ANN P. WATHEN, State Bar No. 189314
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5972
Fax: (415) 703-1234
Email: Ann.Wathen@doj.ca.gov

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONNELL RAY HILL,

Petitioner,

v.

V.M. ALMAGER, Warden,

Respondent.

C 07-3229 JSW (PR)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF ANSWER TO
PETITION FOR WRIT OF
HABEAS CORPUS**

STATEMENT OF THE CASE

On April 21, 2004, following a jury trial in Monterey County Superior Court, petitioner was convicted of four counts of inflicting corporal injury on a spouse (Cal. Penal Code^{1/} § 273.5(a)), three counts of aggravated assault (§ 245(a)(1)), forcible oral copulation (§ 288a(c)(2)), spousal rape (§ 262(a)), forcible object penetration (§ 289(a)(1)), forcible sodomy (§ 286 (c)(2)), two counts of making criminal threats (§ 422), false imprisonment (§§ 236/237), and four misdemeanor counts of

1. All further statutory references are to the California Penal Code unless otherwise indicated.

1 criminal contempt/disobedience of a protective order (§ 166(c)(1)). CT 314-16, 318-40, 486.^{2/} On
 2 April 22, 2004, in a bifurcated proceeding, the trial court found the two prior strike convictions true.
 3 CT 316; RT 1023-24. On July 1, 2004, the trial court sentenced petitioner to 29 years to life on
 4 count two, 25 years to life on count three, 30 years to life on count five, and four 25 years to life
 5 terms on counts nine through twelve. The court ordered that the terms run consecutively. CT 369-
 6 75, 392-95.

7 On February 1, 2005, petitioner appealed his conviction to the California Court of Appeal
 8 (H027710). Exh. 3. On April 13, 2005, the People filed the respondent's brief. Exh. 4. On
 9 December 16, 2005, the California Court of Appeal affirmed the judgment of conviction. Exh. 5.

10 On January 20, 2006, petitioner filed a petition for review in the California Supreme Court
 11 (S140531), which was denied on February 22, 2006. Exhs. 6, 7. On October 4, 2006, petitioner
 12 filed a state habeas petition in the California Supreme Court (S147089), which was denied on April
 13 18, 2007. Exhs. 8, 9.

14 On June 6, 2007, petitioner timely filed the instant petition in this Court, claiming that:
 15 (1) his trial counsel had rendered ineffective assistance of counsel in violation of his Sixth
 16 Amendment right to counsel; and (2) his upper term and consecutive sentence violated his rights
 17 under the Fifth, Sixth, and Fourteenth Amendments.^{3/} Petition at 6. On October 30, 2007, this
 18 Court issued an order to show cause, directing respondent to respond to these two claims. 10/30/07
 19 OSC.

20 **STATEMENT OF FACTS^{4/}**

21 Defendant's wife returned home around 10 p.m on Tuesday evening, February 4,
 22

23 2. Exhibit references are to the state records lodged with the Answer. References to "CT"
 24 and "RT" are to the Reporter's Transcript and Clerk's Transcript of state proceedings, Exhs.1 and
 2, respectively.

25 3. Petitioner also raised a third claim pertaining to an error of state law, which this Court
 26 determined was not cognizable in federal habeas corpus. 10/30/07 Order to Show Cause (OSC).

27 4. The Statement of Facts is quoted from the opinion of the California Court of Appeal.
 28 Exh. 5 at 1-4. Respondent's statement of facts on direct appeal, with record citations, appears in
 Exhibit 4 at 2-9.

1 2003, after being out and was confronted by defendant in the parking lot of their
2 apartment complex. Very angry, defendant accused his wife of having an affair. An
3 argument ensued, continuing inside their apartment. During the argument, defendant
4 ripped the crotch of her stockings and pulled them down. He inserted his fingers inside
5 her vagina and asked her who she had been having sex with. Defendant then hit the side
6 of her face, injuring her ear and causing her to fall in pain. Defendant proceeded to
7 strangle her with his hands and a scarf until she began to shake and lost consciousness.
8 Later that night, when she regained consciousness, defendant threw a medicine bottle at
9 her, hitting her in the face.

10 Also that night, defendant forced his wife to engage in a number of sexual acts,
11 including intercourse, oral copulation, sodomy and forcible object penetration.
12 Defendant's wife testified that over the course of their seven-year relationship, they had
13 sometimes had fights that were followed by consensual sexual intercourse. However, she
14 testified that on this occasion she did not consent, but had participated because she was
15 afraid defendant would kill her and she felt she had no choice.

16 Some time later, the defendant made his wife accompany him to purchase drugs.
17 When they were out, she did not run away because she was afraid of what he would do
18 if he caught her; and when in the apartment she could neither escape nor call for help
19 because he locked her in and disabled all of the phones.

20 Over the course of the four-day imprisonment, defendant choked his wife three
21 more times. During one of these incidents, defendant told his wife he would kill her and
22 get rid of her body and she blacked out again, regaining consciousness only to see
23 defendant searching for lighter fluid. He told her the lighter fluid was to kill her and burn
24 her. When he couldn't find lighter fluid, he threw bleach on her and tried to light her on
25 fire, but the bleach on her clothing did not ignite. Defendant then grabbed a knife and
26 stabbed his wife 40 or 50 times leaving wounds which healed without the need for
27 stitches, although some left scars.

28 Saturday afternoon, when defendant left the apartment, he left the door unlocked and
his wife was able to escape and run for help. After police arrived, they observed her
injuries and took a report. They took the defendant's wife to the hospital where she
received treatment and underwent a sexual assault exam. The sexual assault nurse
concluded that her injuries were consistent with her version of events.

Shortly thereafter, the defendant's wife sought and obtained a restraining order
against defendant precluding him from having any contact with her. Despite the order,
defendant wrote five letters to his wife and called her once on the telephone.

Defendant was arrested and charged . . . [¶] At trial, defendant testified and
contradicted his wife's version of events. He denied ever confining her, threatening her
or assaulting her. He claimed that any scuffles they had were a result of him trying to
defend himself from her drug-induced delusional attacks. [¶] . . . Defendant admitted that
he had pleaded guilty to hitting his wife in 2001 and also admitted that he had two prior
felony convictions. The trial court . . . [in a bifurcated proceeding] found the two prior
strike convictions to be true

Exh. 5 at 2-5, footnote omitted.

///

///

ARGUMENT

I.

STANDARD OF REVIEW ON THE MERITS

A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or were "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts. 28 U.S.C. § 2254(d). Under the "contrary to" clause, a state court's decision is contrary to federal law if it "contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *See Early v. Packer*, 537 U.S. 3, 8 (2002), *quoting Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). That test does "not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. at 8. The ultimate controlling authority is the holding of the Supreme Court's cases at the time of the relevant state-court decision, not the dicta. *Williams v. Taylor*, 529 U.S. at 412. The state courts are presumed to "know and follow the law," and the standard for evaluating state-court rulings, which are given the "benefit of the doubt," is "highly deferential." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). In order to warrant habeas relief, the state court's application of clearly established federal law must be not merely erroneous or incorrect but "objectively unreasonable." *Williams v. Taylor*, 529 U.S. at 409; *see also Woodford v. Visciotti*, 537 U.S. at 25. It is the habeas petitioner's burden to make that showing. *Id.* The state court's factual determinations are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

To determine whether a petitioner is entitled to habeas relief under § 2254(d), the federal court must look to the last reasoned state court decision. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Where the state's highest court did not provide a reasoned decision, the district court "looks through" to the underlying appellate court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991). If the state court decided the petitioner's claims on the merits, but did not provide

any reasoning for its decision, the federal habeas court must independently review the record to determine whether habeas corpus relief is available to the petitioner under § 2254(d). *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). If the state court denied the petitioner's claims on procedural grounds or did not decide the petitioner's claims on their merits, the deferential standard of the AEDPA does not apply and the federal court must review the petitioner's claims de novo. *Medley v. Runnels*, 223 F.3d 976, 863 n. 3 (9th Cir. 2007); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

Furthermore, even if the state court's ruling is contrary to or an unreasonable application of Supreme Court precedent, that error justifies overturning the conviction only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The *Brecht* standard applies to all § 2254 cases, regardless of the type of harmless error review conducted by the state courts. *Fry v. Pliler*, ___ U.S. ___, 127 S.Ct. 2321, 2327; 168 L.Ed. 2d 16, 23 (2007).

II.

PETITIONER'S TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE

Petitioner contends that his trial counsel rendered ineffective assistance in violation of his Sixth Amendment right to counsel by failing to: (1) prepare or present a viable defense; (2) call Defense Investigator Garry St. Clair as a witness to impeach Jane Doe; (3) call an expert witness to refute the SART (Sexual Assault Response Team) exam evidence and to testify about the lack of evidence pertaining to fingerprints on the knife, residue on the bottle stopper, and blood tests; (4) file a motion to exclude the victim's parents from the courtroom; and (5) effectively cross-examine Jane Doe and Detective Balesteri, two prosecution witnesses. Petition at 6-6a.

When petitioner raised the foregoing claims in the habeas petition that he filed with the California Supreme Court, Exh. 8, the Court summarily denied the petition, Exh. 9. Accordingly, this Court must review petitioner's claims of ineffective assistance of counsel de novo. *Medley v. Runnels*, 506 F.3d at 863 n. 3; *Pirtle v. Morgan*, 313 F.3d at 1167. Here, as discussed in detail below, *see* Arg. II.B, *infra*, petitioner was not denied his right to the effective assistance of counsel.

1 **A. Standard Of Review**

2 In *Strickland v. Washington*, 466 U.S. 668, 686 (1984), the Supreme Court set forth a two-
 3 prong test to evaluate a claim of ineffective assistance of counsel. Under the first prong, “the
 4 defendant must show that counsel’s representation fell below an objective standard of
 5 reasonableness.” *Id.* at 688. When assessing the performance of defense counsel under the first
 6 prong of the *Strickland* test, a reviewing court must be “highly deferential” and “indulge a strong
 7 presumption that counsel’s conduct falls within the wide range of reasonable professional
 8 assistance.” *Id.* at 689. The reviewing court must not second-guess defense counsel’s trial strategy,
 9 keeping in mind that “[e]ven the best criminal defense attorneys would not defend a particular client
 10 in the same way.” *Id.* The relevant inquiry is therefore not what defense counsel could have done,
 11 but rather whether the choices made by defense counsel were reasonable. *See Babbitt v. Calderon*,
 12 151 F.3d 1170, 1173 (9th Cir. 1998). There is a “wide range of reasonable professional conduct,”
 13 and a “strong presumption” that counsel’s conduct fell within that range. *Strickland*, 466 U.S. at
 14 689.

15 The second prong of the *Strickland* test is no less strict. The petitioner bears the “highly
 16 demanding” and “heavy burden” of establishing actual prejudice. *Williams v. Taylor*, 529 U.S. at
 17 394. A defendant must carry this burden by means of “affirmative” proof. *Strickland*, 466 U.S. at
 18 693. It requires showing “a reasonable probability that but for counsel’s unprofessional errors, the
 19 result . . . would have been different.” *Id.* at 694. “A reasonable probability is a probability
 20 sufficient to undermine confidence in the outcome.” *Id.* It is insufficient to show only that the
 21 errors had some conceivable effect on the outcome of the proceeding, because virtually every act
 22 or omission of counsel would meet that test. *Id.* at 693. If the absence of prejudice is clear, a court
 23 should dispose of the ineffectiveness claim without inquiring into the performance prong. *Id.* at 692.

24 **B. Petitioner’s Trial Counsel Rendered Effective Assistance**

25 Petitioner claims that his trial counsel rendered ineffective assistance of counsel in various
 26 ways. Petition at 6. As discussed in detail below, petitioner’s claims are meritless.

27 **1. Viable Defense**

28 Initially, petitioner claims that his counsel rendered ineffective assistance because he

1 failed to prepare and present a viable defense. Petitioner complains that his counsel misled him by
2 presenting a “rough sex defense.” He further claims that his counsel should have presented evidence
3 that Jane Doe started the altercation between them by hitting him in the head with a bookend
4 because she was jealous of petitioner’s mistress and angry about his infidelity. Petition at 6.

5 There are many different reasonable ways four counsel to defend a case. *Strickland*, 466
6 U.S. at 689; *Edwards v. LaMarque*, 475 F.3d 1121, 1128 (9th Cir. 2007) (en banc); *Moore v.*
7 *Deputy Commissioners of Sci-Huntington*, 946 F.2d 236 (3d Cir. 1991). Generally, trial counsel
8 does not render ineffective assistance by choosing one or more defense theories over another.
9 *People v. Cunningham*, 25 Cal.4th 926, 1007 (2001). The decision whether to raise a particular
10 defense is related to trial strategy and informed “strategic or tactical decisions on the part of counsel
11 are presumed correct, unless they were completely unreasonable, not merely wrong.” *Bullock v.*
12 *Carver*, 296 F.3d 1036, 1047 (10th Cir. 2002); *see, e.g., Pirtle v. Morgan*, 313 F.3d 1160, 1196-73
13 (9th Cir. 2002) (finding that defense counsel’s performance was deficient because he did not assert
14 a diminished capacity defense).

15 Here, petitioner’s counsel acted reasonably in defending petitioner on multiple fronts in
16 the manner that he did. In defending petitioner on count two and the accompanying special
17 allegation (inflicting corporal injury on a spouse and personally inflicting great bodily injury under
18 circumstances involving domestic violence), CT 288, petitioner’s counsel did as exactly as petitioner
19 suggested: he raised a self-defense claim. Specifically, petitioner’s counsel elicited petitioner’s
20 testimony that while he was arguing with Jane Doe regarding her whereabouts on the evening of
21 February 4, 2003, Jane Doe hit him in the head with a bookend and that he hit her back in self-
22 defense. RT 623-25. Petitioner’s counsel also introduced evidence of Jane Doe’s jealousy of
23 Miriam, petitioner’s mistress, and her anger about petitioner’s infidelity. In that regard, Jane Doe
24 testified that she knew Miriam was involved with her husband, was angry about it, and yelled at
25 petitioner about his affair with Miriam during the four-day ordeal. RT 513-14, 516, 526.
26 Petitioner’s counsel subsequently used the evidence to argue to the jury that petitioner had acted in
27 self-defense, RT 806, 808, and ensured that the trial court gave the jury proper instructions regarding
28 self-defense. CT 438-40.

1 In defending petitioner on the sexual assault counts, CT 291-94, petitioner's counsel told
2 the jury that Jane Doe had consented to all of the sex acts. RT 804-05, 810. This was a reasonable
3 way to defend against those charges in light of petitioner's and Jane Doe's testimony. Petitioner
4 testified that he and Jane Doe had had consensual sex multiple times over the four-day period, and
5 when he attempted to have sex with her on February 7, but she indicated that she did not want to,
6 he stopped. RT 649. Petitioner's counsel also elicited Jane Doe's testimony that, in the past, she
7 had had "make-up sex" with petitioner after a fight and would normally have sex with petitioner if
8 he wanted to have sex. RT 509. Petitioner's counsel also impeached Jane Doe with her preliminary
9 hearing testimony in which she stated that she had "participated" in the sexual acts with petitioner
10 over the four-day period. RT 510. In light of the foregoing, it is evident that petitioner's counsel
11 acted reasonably in defending petitioner the way that he did against the various charges.

12 **2. Defense Investigator**

13 Next, petitioner claims that his counsel's performance was deficient because he failed to
14 call Defense Investigator St. Clair as a witness to impeach Jane Doe. Prior to trial, Investigator St.
15 Clair interviewed Jane Doe. Exhs. 44-46, 60-61, 63 attached to Exh. 8. During one of the
16 interviews, Jane Doe told the investigator that she "might have had sex" with petitioner the night
17 after the stabbing and "that [wa]s when he put the Terra Cotta bottle stopper inside [her] rectum, and
18 then took [it] out." Exh. 44 attached to Exh. 8. She also told the investigator that her prior husband
19 and boyfriend had been abusive and that she had filed a complaint against her boyfriend for assault
20 and battery. In a subsequent interview, Jane Doe denied that she had made such statements to the
21 investigator. Exhs. 60, 61 attached to Exh. 8. Jane Doe admitted to the investigator that she had
22 used marijuana and had used methamphetamine with petitioner on one occasion. She also stated
23 that petitioner had made her "do crank" during the four-day ordeal. Exhs. 60, 61, 63 attached to
24 Exh. 8. In addition, Jane Doe told the investigator that she did not want her parents to learn about
25 things she had "done wrong in her past." Exh. 63 attached to Exh. 8. Jane Doe also told the
26 investigator that petitioner had lied about her having a criminal history. Exh. 63 attached to Exh.
27 8.

28 Counsel's decision not to call a particular witness to testify must be informed by an

adequate investigation in order to be deemed a reasonable, tactical decision that will be upheld under the *Strickland* standard. *Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (9th Cir. 1994). Generally, a petitioner's complaints about defense counsel's failure to call certain witnesses at trial are not favored under habeas corpus review. *United States v. Neresian*, 824 F.2d 1294, 1321 (2d Cir. 1987).

Here, petitioner's counsel acted reasonably by not calling Investigator St. Clair as a witness. Several statements which Jane Doe made to the investigator were inadmissible. For example, whether Jane Doe's prior husband or boyfriend hit her was irrelevant as it had no tendency to prove whether *petitioner* had abused Jane Doe. Such evidence would have had a danger of confusing the jury about the issues before it. Exh. 60 attached to Exh. 8; *see* RT 517 (the trial court's decision to sustain the objection to defense counsel's attempt to introduce evidence that Jane Doe had been abused by other men). Furthermore, Jane Doe's admission to the investigator that she had used drugs constituted inadmissible evidence as it was redundant to Jane Doe's trial testimony on the same subject. *See, e.g.*, RT 339 (Jane Doe's admission that she had used drugs when petitioner gave them to her), 522-23 (Jane Doe's admission that she had used drugs five years ago), 340-41, 529 (Jane Doe's testimony that petitioner gave her crack cocaine and she used the drug once during the four-day ordeal to ease her pain). Jane Doe's statement to the investigator about not wanting her parents to know about the things she had done wrong in the past (Exh. 63 attached to Exh. 8) was also cumulative evidence. At trial, Jane Doe insinuated that she did not want her minister father to know about her past drug usage, adding that her "father loves [her] regardless." RT 523.

Other statements made by Jane Doe to the investigator had little or no impeachment value. For example, Jane Doe's statement that she might have had sex with petitioner did little to impeach Jane Doe as she made no indication at that time whether the sex was consensual. In addition, Jane Doe tied the sexual intercourse incident to the forcible object penetration incident, making it inferrable that she did not consent to either act, a statement that was consistent with her trial testimony. Exh. 44 attached to Exh. 8. There was also no evidence that Jane Doe had committed any prior offenses which could have been used for impeachment purposes and her statement to the investigator that petitioner had lied about her having a criminal past (Exh. 63 attached to Exh. 8) was

1 consistent with that fact. Also, Jane Doe's statements to the investigator regarding her limited drug
2 use was consistent with her trial testimony and could not have been used to impeach her. RT 339-
3 41, 522-23, 529. The fact that Jane Doe later recanted her statements about having been abused by
4 her prior boyfriend and husband had some impeachment value, but undoubtedly would not have
5 been admitted for the reason that such evidence had a danger of prolonging the trial with mini trials
6 with issues that were marginally relevant, if at all, and posed a danger of confusing the jury. Based
7 on the foregoing, it is evident that petitioner's counsel acted reasonably by not calling the defense
8 investigator as a witness.

9 **3. Expert Witness**

10 Petitioner also claims that his counsel rendered ineffective assistance because he failed
11 to call an expert witness: to refute the evidence regarding the SART exam; to testify that no
12 fingerprints were ever obtained from the knives collected at the apartment; to testify that the blood
13 obtained from the scene was never tested to determine whose blood it was; and to testify that the
14 bottle stopper had never been tested to prove that it had been inserted into Jane Doe's rectum.

15 As indicated above, counsel's decision not to call a particular witness to testify must be
16 informed by an adequate investigation in order to be deemed a reasonable, tactical decision that will
17 be upheld under the *Strickland* standard. *Sanders v. Ratelle*, 21 F.3d at 1456-57. Generally, a
18 petitioner's complaints about his counsel's failure to call particular witnesses at trial are not favored
19 under habeas corpus review. *United States v. Neresian*, 824 F.2d at 1321.

20 Here, petitioner's counsel acted reasonably by not calling an expert witness. First,
21 petitioner does not explain how an expert would have been able to refute the powerful medical
22 evidence, including the photographs, documenting Jane Doe's various injuries. 5 RT 320-22, 574-
23 78. Moreover, petitioner's counsel did elicit testimony favorable to the defense during his cross-
24 examination of the SART nurse. Specifically, petitioner's counsel elicited the SART nurse's
25 testimony that Jane Doe had no injuries in her vagina or cervix area, and that the one injury in Jane
26 Doe's genital area—the abrasion on the posterior fourchette—could have happened during a sexual
27 assault *or* consensual sex. RT 583. The SART nurse also testified that Jane Doe had reported that
28 petitioner had strangled her with one hand and a neck tie (as opposed to two hands and a scarf, RT

272, 313), and that she (the nurse) had heard of couples engaging in consensual sex while using an item to partially asphyxiate a partner during sex. RT 584-86.

Second, there was little doubt whose blood had been found in the apartment. After the four-day ordeal, Jane Doe was treated at the hospital for numerous injuries, including her bloody ear and gaping wounds which were consistent with her claim of having been stabbed multiple times. RT 283-90, 320, 329, 531, 571, 574. Petitioner also admitted that he hit Jane Doe in the ear and stabbed her (at least, inadvertently). RT 624, 632, 640, 642, 652, 656, 679. Petitioner never claimed he had been stabbed, RT 601, 637-40, 656, or that he had bled when Jane Doe allegedly hit him in the head. RT 624. Moreover, when the police arrested petitioner the day after the ordeal ended, he had no visible injuries on his body other than some superficial scratches. RT 599-601.

Third, the lack of fingerprint evidence added nothing to petitioner's defense. There was no dispute that petitioner had used a knife to stab Jane Doe. Jane Doe testified that petitioner had repeatedly stabbed her. RT 318, 320. Petitioner admitted he had stabbed Jane Doe and merely claimed that he had accidentally done so while they were wrestling with the knife. RT 640, 652, 656, 664. Petitioner never claimed that Jane Doe had stabbed him, and as indicated above, he had no wounds that would have supported such a claim if he had made it. RT 599-600, 637-40. Thus, whether Jane Doe's, petitioner's, or no fingerprints were on the knife was a non-issue for the jury.

Lastly, petitioner's counsel acted reasonably by not calling an expert to testify that the bottle stopper had never been tested. There was no need for an expert to testify about the lack of evidence in that regard as that was more than apparent to the jury. The prosecutor never introduced the bottle stopper or any test results during the trial, and petitioner's counsel, without objection, highlighted this fact for the jury during his closing argument. RT 811. Based on the foregoing, it is evident that petitioner's counsel acted reasonably by not calling an expert witness.

4. Exclusion Of Jane Doe's Parents From The Courtroom

Petitioner's claim that his counsel rendered ineffective assistance by failing to file a motion to exclude Jane Doe's parents from the courtroom because it tainted her testimony, is without merit. Defense counsel's failure to make a motion does not constitute ineffectiveness if making the motion would have been futile. *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994). There

is no requirement that defense counsel bring meritless motions on behalf of his client. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1349 (1996); *see Acha v. United States*, 910 F.2d 28, 32 (1st Cir. 1990) (trial counsel is not obligated to raise meritless claims and the failure to do so is not ineffective assistance of counsel); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (a defense counsel's failure to make a meritless argument does not constitute ineffectiveness).

Here, a motion to exclude Jane Doe's parents from the courtroom would have been futile. Under California law, a trial court has discretion to exclude from the courtroom any witness not at the time testifying so that such witness cannot hear the other witnesses' testimony. Cal. Evid. Code § 777(a); *People v. Willingham*, 271 Cal.App.2d 562, 571 (1969). A trial court also has the discretion to exclude a disruptive spectator from the courtroom. *People v. Holloway*, 33 Cal.4th 96, 148 (2004). Jane Doe's parents did not fall into either category. Rather, they were spectators (not witnesses) in the courtroom who were there to support their daughter and they did nothing to disrupt the proceedings. Thus, there was no basis to exclude them and petitioner's counsel did not perform deficiently by failing to file such a futile motion.

Even assuming, arguendo, that such a motion would have been successful, petitioner's counsel made a reasonable tactical decision not to make such a motion. Although there was some evidence that Jane Doe had given evasive testimony about her past drug usage which could have been attributed to her parents' presence in the courtroom, RT 522-23, this did not harm petitioner. To the contrary, petitioner's counsel used the testimony to his advantage by arguing to the jury that Jane Doe was not believable because she had lied about her drug use as well as other matters. RT 807. Petitioner's counsel also suggested to the jury that Jane Doe might have lied about the entire incident because she could have thought that it would be easier for her parents to accept that her husband had abused her in a jealous rage rather than to accept that she (and her husband) had led a lifestyle contrary to her parents' exemplary lifestyle. RT 812-13. *See Bell v. Lockhart*, 741 F.2d 1105, 1108-09 (8th Cir. 1984) (concluding that defense counsel acted reasonably in deciding not to file a motion for a directed verdict in light of the potential increase in exposure to the defendant).

5. Cross-examination Of Jane Doe And Detective Balesteri

Lastly, petitioner claims that his counsel rendered ineffective assistance by not effectively

1 cross-examining two prosecution witnesses, Jane Doe and Detective Balesteri. With regard to Jane
2 Doe, petitioner claims that his counsel failed to question Jane Doe about her prior criminal history
3 and her statement to the investigator about “having sex.” Exh. 63 attached to Exh. 8. Petitioner’s
4 counsel did not perform deficiently by not questioning Jane Doe about these matters. First, there
5 was no evidence that Jane Doe had committed any offenses which could have been introduced for
6 impeachment purposes. Jane Doe’s statement to the investigator corroborated this fact as she
7 explained to him that petitioner had lied about her having a criminal history. Exh. 63 attached to
8 Exh. 8.

9 Second, Jane Doe’s statement to the investigator that she might have “had sex” with
10 petitioner did little to impeach Jane Doe. She made no indication at that time that the sex was
11 consensual. In fact, when Jane Doe made the statement to the investigator, she tied the sexual
12 intercourse incident to the forcible object penetration incident (Exh. 44 attached to Exh. 8), making
13 it inferrable that she did not consent to either act, a statement that was consistent with her trial
14 testimony, and thus, would have had no impeachment value. Furthermore, petitioner’s counsel
15 effectively cross-examined Jane Doe on the consent issue, including using her preliminary hearing
16 testimony to impeach her. *See* RT 509-10.

17 With regard to Detective Balesteri, petitioner claims that his counsel failed to impeach the
18 detective with his direct examination testimony, in which he had indicated that he could not recall
19 whether he had found keys and operational phones in the apartment, even though there was evidence
20 that he had. Petitioner’s counsel performance was adequate in this regard.

21 During direct examination about the phones, Detective Balesteri testified that he had found
22 a cordless phone without a battery, but found a battery a few feet away. RT 556. On cross-
23 examination, petitioner’s counsel elicited this same testimony, as well as the fact that the detective
24 had not attempted to put the battery in the phone to determine if it was operational, RT 566, 568,
25 or determined whether the fax machine he had found inside the apartment was operational. RT 566;
26 *see also* RT 598-99 (Detective Widener’s testimony that no one checked the fax machine to
27 determine if it worked). In addition, Detective Balesteri testified that he had failed to mention in
28 his police report whether he had found any other phones and that he could not recall if there were

1 other phones inside the apartment. RT 567. Petitioner's counsel then proceeded to impeach
2 Detective Balesteri. Specifically, he elicited Detective Widener's testimony that Detective Balesteri
3 had reported to him that he had found a working phone in the bedroom of the apartment. RT 597-
4 98.

5 With regard to the key evidence, petitioner's counsel elicited Detective Balesteri's
6 testimony on cross-examination that, inside the apartment, he had found a key on the table behind
7 the computer and confirmed that it fit the dead bolt. RT 566-567. Because Detective Balesteri
8 testified consistently with his police report (Exh. 64 attached to Exh. 8), and his testimony
9 effectively undermined Jane Doe's claim that she had been unable to escape from the apartment
10 because she had no key, it was unnecessary for petitioner's counsel to further question the detective
11 about the key found inside the apartment. In sum, it is evident that petitioner's counsel performed
12 adequately by effectively cross-examining and impeaching Detective Balesteri and Jane Doe.

13 **C. There Was No Prejudice**

14 Even assuming, arguendo, that the performance of petitioner's counsel was deficient, there
15 was no prejudice. *Brecht v. Abrahamson*, 507 U.S. at 637-38; *see Fry v. Pliler*, 127 S.Ct. at 2327
16 (the *Brecht* standard of review should be used for all federal habeas cases regardless of whether the
17 state court applied *Chapman v. California*, 386 U.S. 18 (1967); *Bains v. Cambra*, 204 F.3d 964, 976-
18 77 (9th Cir. 2000) (even if state court does not have occasion to apply the test for assessing prejudice
19 applicable under federal law, the *Brecht* standard applies uniformly in all federal habeas corpus
20 cases under § 2254); *see Henry v. Estelle*, 33 F.3d 1037, 1041 (9th Cir. 1993) (*Brecht* harmless error
21 standard applies to constitutional magnitude, trial type errors, and is the equivalent of harmless error
22 standard under California law), *rev'd sub nom on other grounds in Duncan v. Henry*, 513 U.S. 364,
23 366 (1995). This is so for the following reasons.

24 First, although neither an expert nor the defense investigator testified, much of the
25 evidence which petitioner claims was critical to his defense was introduced at trial. For example,
26 the jury was well aware that Jane Doe had not been completely forthcoming about her own drug use
27 based on her evasive and inconsistent answers during the trial. RT 339-41, 522-23, 529. Also, the
28 lack of fingerprint evidence with respect to the knives was introduced into evidence when

petitioner's trial counsel asked Detective Balesteri if he had processed any of the knives for fingerprints, and the detective responded "no." RT 561. Petitioner's counsel also introduced evidence that the state had failed to determine whose blood it was in the apartment. Specifically, petitioner's trial counsel asked Detective Balesteri whether he had gotten any tests result regarding the type of blood from the samples that he had collected in the apartment, and the detective responded, "No. I didn't do that test." RT 564. Detective Widener further confirmed that no blood tests had be done on the blood samples. RT 595.

Moreover, there was overwhelming evidence to support the jury's verdicts. Jane Doe immediately and consistently reported, with minor exceptions, to numerous people that petitioner had repeatedly assaulted her and held her against her will inside their apartment over a four-day period. CT 17-80; RT 549-51, 573-74, 591. At trial, Jane Doe described how petitioner repeatedly locked her inside the apartment, took the apartment keys, disabled the phones, and monitored her every call. RT 299-300, 303-06. She also described the assaults in detail and how petitioner had threatened to kill her multiple times. RT 260-329. The evidence that the police found inside the apartment immediately after the ordeal, as well as petitioner's own statements, corroborated Jane Doe's statements. *See, e.g.*, RT 551, 557, 560-61 (knives inside the apartment), 551, 561-64 (blood in various areas of the apartment), 555 (Chloroseptic bottle), 556 (disabled phone), 557, 604 (bleach spots on Jane Doe's shirt), 557 (Jane Doe's ripped panty hose), 563-64, 604 (blood on Jane Doe's shirt), 624 (petitioner's testimony that he hit Jane Doe's ear causing it to swell), 631 (petitioner's testimony that he "twirled a scarf around [Jane Doe's] neck"), 641 (petitioner's testimony that he accidentally hit Jane Doe with the Chloroseptic bottle).

Jane Doe's shaken state and numerous injuries also supported her claims. RT 539-40, 544-45, 549, 571, 574-78, 591. On February 8, 2003, when Jane Doe was finally able to escape from the apartment, she ran screaming to the apartment manager and her assistant, begging them for help. RT 539-40, 544. The managers did not initially recognize Jane Doe although they knew her. RT 541, 544. The apartment managers noticed that Jane Doe could hardly breathe, her face was swollen, and the managers could "barely hear" her voice as she (Jane Doe) was attempting to ask them for help. RT 540, 545. Jane Doe was hysterical and yelled, "He's after me" so the assistant

the court to impose consecutive terms on counts two, three, five, and nine through twelve. (Sent. RT 9-10; *see* CT 388-91 [People’s Sentencing Memorandum].) With respect to counts nine through twelve, the prosecutor stated that the crimes constituted four different sexual assaults on the victim, and that petitioner had had time to reflect between each sexual act before he decided to commit the next one. Sent. RT 10; *see* CT 388-90 (People’s Sentencing Memorandum). Petitioner’s counsel objected to the consecutive sentences on counts two, three, and five, claiming that they constituted the same conduct as that in counts six, seven, and eight. Defense counsel urged the court to impose a 30-years-to-life term on count five (the stabbing incident) and concurrent terms on the remaining counts, arguing that it was “all one transaction” and did not occur on “separate occasions.” Sent. RT 10-12, 16.

The trial court imposed four consecutive terms of 25 years to life on counts nine through twelve, stating in relevant part:

[T]he reason I am making each of those counts consecutive is because I find under Penal Code section 667.6(d) that each act was a separate act. The defendant did have ample time and opportunity to reflect upon his actions, and nevertheless did resume the assaultive behavior. That each act . . . does represent a different sexual act, each required different positions or different tools or objects, and two of the four acts occurred in the front room.

Sent. RT 13-14.

The trial court also sentenced petitioner to consecutive terms of 29 years to life on count two, 25 years to life on count three, and 30 years to life on count five. CT 371-73. In imposing consecutive terms on counts two, three, and five, the trial court stated, in relevant part:

I believe that although it was a single victim involved, they were separate occurrences. The defendant had an opportunity to reflect between the occurrences, and in fact, a number of hours transpired between . . . [¶] . . . Count 2 -- the injury to the ear, and the scarf strangulation[,] Count 3, which occurred in the early morning hours of February 5; and again, the knife wound that occurred sometime late February 5th or early February 6th. They’re each separate occurrences, they each resulted in very serious physical injur[ies], and for that reason the sentences will be consecutive.

Sent. RT 15-16.

On appeal, petitioner contended that the trial court erred by imposing consecutive terms on his multiple counts of conviction because the court’s findings at sentencing were not admitted by him nor proved to a jury beyond a reasonable doubt in violation of *Blakely v. Washington*, 542

1 U.S. 296 (2004). Exh. 3 at 24-37.

2 On June 20, 2005, while petitioner's state appeal was pending, the California Supreme
3 Court, in *People v. Black* 35 Cal.4th 1238 (*Black I*) (2005), held that "the judicial fact-finding that
4 occurs when a judge exercises discretion to impose . . . consecutive term[s] under California law
5 does not implicate a defendant's Sixth Amendment right to a jury trial." *Id.* at 1244. *Black I* also
6 cited with approval *People v. Groves*, 107 Cal.App.4th 1227, 1230-31, which held that the
7 imposition of full consecutive sentences under section 667.6(d) did not violate a defendant's right
8 to a jury trial. *Black I*, 35 Cal.4th at 1263, n. 19.

9 On December 16, 2005, the California Court of Appeal rejected petitioner's claim, stating:

10 Even if defendant had not waived this argument by failing to raise it at his
11 sentencing, which took place after the *Blakely* decision was filed, the California Supreme
12 Court recently rejected the claim that *Blakely* entitles a defendant to a jury trial on any
13 facts that support the trial court's decision to impose consecutive terms. The Court
14 concluded that "the judicial fact-finding that occurs when a judge exercises discretion to
15 impose . . . consecutive term[s] under California law does not implicate a defendant's
16 Sixth Amendment right to a jury trial." (*People v. Black* (2005) 35 Cal.4th 1238, 1244
17 [(*Black I*)).) *Black* is dispositive of defendant's *Blakely* challenge. Accordingly,
18 defendant's contention is not well taken. (*Auto Equity Sales, Inc. v. Superior Court*
19 (1962) 57 Cal.2d 450, 455.)

20 On January 20, 2006, petitioner filed a petition for review in the California Supreme Court
21 (S140531). Exh. 6. On February 22, 2006, the California Supreme Court issued its order, stating:

22 Petition for review denied without prejudice to any relief to which defendant might
23 be entitled after the United States Supreme Court determines in *Cunningham v.*
24 *California*, No. 05-6551, the effect of *Blakely v. Washington* (2004) 542 U.S. 296 and
25 *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed. 2d 621], on
26 California law.

27 Exh. 7.

28 **B. The California Courts Did Not Unreasonably Apply United States Supreme
Court Precedent In Denying Petitioner's Claim**

Petitioner's claim should be rejected because there is no Supreme Court holding regarding
the imposition of consecutive sentences. In *Cunningham v. California*, 549 U.S. 270, 127 S. Ct.
856, 166 L. Ed. 2d 856 (2007), the Supreme Court held that California's procedure for imposing an
upper term violates the Sixth Amendment right to a jury trial because it exposes a defendant to a
sentence greater than the statutory maximum based on facts found by the trial court by a

1 preponderance of the evidence rather than by the jury beyond a reasonable doubt. The Court found
2 that the statutory maximum term under the Determinate Sentencing Law (DSL) for Sixth
3 Amendment purposes is the middle term, which is the longest sentence a trial court may impose
4 exclusively on the basis of facts.

5 *Cunningham* rejected the California Supreme Court’s opinion in *Black I* only on the issue
6 of upper term sentencing. *See Cunningham*, 127 S. Ct. at 868-71 (rejecting the California Supreme’s
7 Court’s decision in *Black I*, which held that California’s upper term procedure was constitutional).
8 No consecutive sentencing issue was raised in *Cunningham* and the case did not even involve
9 multiple sentences. No language in *Cunningham* suggests that the Court would intend to apply its
10 holding to a decision of how a judge aggregates the punishment for multiple offenses. *Apprendi v.*
11 *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely*, 542 U.S. 296,
12 as well as *Cunningham*, do not apply to the imposition of consecutive sentences. These cases were
13 concerned with the finding of a fact “that increases the penalty for a crime beyond the prescribed
14 statutory maximum.” *Cunningham*, 127 S. Ct. at 864; *Blakely*, 542 U.S. at 301; *Apprendi*, 530 U.S.
15 at 490. The California Supreme Court’s decision in *Black I* regarding consecutive sentencing is,
16 therefore, not contrary, or an unreasonable application of, United States Supreme Court precedent
17 because there is no such precedent as to the issue of consecutive sentencing.

18 Notably, the United States Supreme Court has held that a trial court may consider
19 sentencing factors in finding that a mandatory minimum applies to a defendant’s sentence.
20 *McMillan v. Pennsylvania*, 477 U.S. 79, 82 (1986). The United States Supreme Court has indicated
21 that there is nothing in the common law to suggest that it is “impermissible for judges to exercise
22 discretion—taking into consideration various factors relating both to offense and offender—in
23 imposing a judgment within the range prescribed by statute, and that “judges in this country have
24 long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual
25 case.” *Apprendi*, 530 U.S. at 481, original in italics; *see also United States v. Booker*, 125 S.Ct. at
26 750. *Apprendi* itself explained that the only relevant issue is the sentence for a single particular
27 crime, not the aggregate effect of the defendant’s multiple sentences. *Apprendi*, 530 U.S. at 474.
28 Thus, as long as the sentence for each count is within the statutory maximum for that conviction,

1 *McMillan*, *Apprendi*, *Blakely*, and *Cunningham* do not forbid consecutive sentencing on multiple
2 counts.

3 All the federal circuits considering the issue have rejected *Apprendi* challenges to
4 consecutive sentencing. *United States v. Buckland*, 289 F.3d 558, 570-71 (9th Cir. 2002) (en banc);
5 *United States v. Hicks*, 389 F.3d 514, 532 (5th Cir. 2004); *United States v. Pressley*, 345 F.3d 1205,
6 1213 (11th Cir. 2003); *United States v. Harrison*, 340 F.3d 497, 500 (8th Cir. 2003); *United States*
7 *v. Lafayette*, 337 F.3d 1043, 1049-50 (D.C. Cir. 2003); *United States v. Hernandez*, 330 F.3d 964,
8 982 (7th Cir. 2003); *United States v. Chorin*, 322 F.3d 274, 278-79 (3rd Cir. 2003); *United States*
9 *v. Lott*, 310 F.3d 1231, 1242-43 (10th Cir. 2002); *United States v. Campbell*, 279 F.3d 392, 401-02
10 (6th Cir. 2002); *United States v. Feola*, 275 F.3d 216, 220 & n. 1 (2d Cir. 2001).^{5/} Also, at least six
11 other state supreme courts have also found that the *Apprendi* line of cases does not impact their
12 consecutive sentencing laws. *State v. Kahapea*, 141 P. 3d 440, 452 (Haw. 2006); *State v. Cubias*,
13 120 P. 3d 929, 932-33 (Wash. 2005); *State v. Higgins*, 821 A.2d 964, 975-76 (N.H. 2003); *State v.*
14 *Bramlett*, 41 P.3d 796, 797-98 (Kan. 2002); *Hall v. State*, 823 So.2d 757, 764 (Fla. 2002); *People*
15 *v. Wagener*, 752 N.E.2d 430, 440-43 (Ill. 2001). *Cunningham* did not alter the analysis set out in
16 *Black I* and these other cases.

17 In sum, the decisions of the California courts rejecting this claim are entitled to deference
18 because they are not contrary to, nor an unreasonable application of, United states Supreme Court
19 precedent. Accordingly, this Court should reject petitioner's constitutional challenge to the
20 imposition of consecutive sentences.

21 **C. There Was No Prejudice**

22 Even assuming there was error, petitioner was not prejudiced. *Brecht v. Abrahamson*, 507
23 U.S. at 637-38; *see Fry v. Pliler*, 127 S.Ct. 2321, 2327 (the *Brecht* standard of review should be used
24 for all federal habeas cases regardless of whether the state court applied the *Chapman* standard); *see*

25
26 5. The Fourth Circuit, although not squarely addressing the issue, has implicitly approved
27 this reasoning by analogizing to the Second Circuit's resolution in *United States v. White*, 240 F. 3d
28 127, 135 (2d Cir. 2001). *United States v. Angle*, 254 F.3d 514, 518-19 (4th Cir. 2001) (reasoning
that under *Apprendi*, the sentence on another count does not affect whether the sentence on this
count is error, but it can affect whether the error is harmless).

1 *also Henry v. Estelle*, 33 F.3d at 1041 (*Brecht* harmless error standard applies to constitutional
2 magnitude, trial type errors, and is the equivalent of harmless error standard under California law).
3 The Supreme Court has held that a *Blakely*-type error in failing to submit an aggravating
4 circumstance to a jury is subject to harmless error analysis. *Washington v. Recuenco*, 548 U.S. 212,
5 126 S. Ct. 2546, 2553, 165 L.Ed. 2d 466 (2006).

6 Here, any error was harmless since the trial court's reasons for imposing consecutive
7 sentences undoubtedly would have been found by a jury beyond a reasonable doubt as there was
8 strong evidence that the four different sexual offenses against Jane Doe occurred on "separate
9 occasions." Petitioner made different statements and gave different directions to Jane Doe before
10 committing each of the sexual acts. After the anal sex (count twelve) and before the sexual
11 intercourse (count ten), petitioner ordered Jane Doe to lie down on the living room floor and "told"
12 her they were going to have sex. RT 292, 527. Petitioner then asked Jane Doe to orally copulate
13 him (count nine), and Jane Doe complied with his request because she felt she had no choice. RT
14 292-93, 509-10. Then, just before penetrating Jane Doe's anus with the bottle stopper (count
15 eleven), petitioner told Jane Doe that he was "going to put it up there." RT 294-95.

16 Each sexual act was different from the previous one, requiring petitioner and Jane Doe to
17 position their bodies differently each time. RT 291-95. For example, after petitioner completed the
18 anal sex, petitioner forced Jane Doe to lie down on the floor so he could penetrate her vagina with
19 his penis. RT 292. Following the rape, either petitioner moved his penis to Jane Doe's mouth or
20 Jane Doe was forced to move her mouth to petitioner's penis so she could orally copulate him. RT
21 292-93. After the oral copulation, petitioner got behind Jane Doe to penetrate her anus with the
22 bottle stopper. RT 293-95. Also, it is inferrable from the record, that petitioner, at some point prior
23 to his object penetration of Jane Doe in the living room, had to retrieve the bottle stopper from the
24 bedroom dresser. RT 293-95. Based on the foregoing, it is evident that petitioner had ample
25 opportunities to reflect upon his actions between each of the sexual assaults.

26 In addition, there was overwhelming evidence that counts two, three, and five constituted
27 separate occurrences. The knifing incident was separated by time and place from the strangling and
28 hitting incidents, giving petitioner more than sufficient time to reflect before committing a new

1 offense against the victim. RT 261, 263, 271-72, 311, 317-18. Also, each offense constituted a
2 separate act of violence, resulting in different physical injuries to the victim. RT 271-72, 283-90,
3 318-23, 348-53, 511. Moreover, there was evidence beyond a reasonable doubt that petitioner had
4 suffered two prior strike convictions. RT 1013-24. It was also evident that petitioner had served
5 prior prison terms, was on probation at the time of his current offenses, and his prior convictions as
6 an adult were both numerous and of increasing seriousness. CT 341-42, 347-48.

7 In sum, a jury would surely have found these factors true if it had been asked to render a
8 verdict on them, and consecutive terms would have been authorized based on any one of them.
9 *People v. Osband*, 13 Cal.4th 622, 729-30 (1996). Consequently, any error was harmless. *Brecht*
10 *v. Abrahamson*, 507 U.S. at 637-38.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the order to show cause be discharged, the petition be denied, and the proceedings be terminated.

Dated: June 26, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

GREGORY A. OTT
Deputy Attorney General

/s/ Ann P. Wathen
ANN P. WATHEN
Deputy Attorney General
Attorneys for Respondent

20118628.wpd
SF2007403010